Commission Decisions

9-24-84	Pyro Mining Company	KENT 84-151	Pg. 2
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Administrative Law Judge Decisions

9-04-84	Harrison Western Corporation	CENT 81-249-RM	Pg. 2
9-06-84	Robin Mullen v. Jim Walter Resources	SE 82-57-D	Pg. 2
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9-24-84	Industrial Constructors Corp.	WEST 83-70-M	Pg. 2
9-24-84	Donald Wiggins v. Colowyo Coal Co.	WEST 83-117-D	Pg. 2
9-24-84	Industrial Constructors Corp.	WEST 84-15-M	Pg. 2
9-24-84	Local 1889/UMWA v Westmoreland Coal	WEVA 81-256-C	Pg. 2
9-24-84	Sec. Labor on behalf of Robt. Ribel,	WEVA 84-4-D	Pg. 2
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	Eastern Associated Coal Corp.	WEVA 84-66-D	
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9-26-84	Herman Whaling v. Eastern Assoc.Coal	WEVA 83-238-D	Pg. 2
9-27-84	Jeffrey Fankhauser v. GEX Hardy, Inc.	LAKE 84-87-D	Pg. 2
9-28-84	Sterling Energy, Inc.	KENT 82-109	Pg. 2
9-28-84	Layne Hamilton v. Stone Mountain Trucking Company, Inc.	VA 83-46-D	Pg. 2

dge Vail, July 26, 1984)

cretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 84-23.
dge Merlin, July 30, 1984)

cretary of Labor, MSHA v. Carbon County Coal Company, Docket No. WEST 82-106
udge Moore, Interlocutory Review of July 2, 1984 Order)

cretary of Labor, MSHA v. Kennecott Minerals Company, Docket Nos.
ST 82-155-M, WEST 83-60-M. (Judge Morris, August 21, 1984)

ry Goff v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 84-86-D.
udge Melick, August 24, 1984)

view was denied in the following case during the month of September:

cretary of Labor on behalf of John Cooley v. Ottawa Silica Company, Docket
. LAKE 81-163-DM. (Judge Koutras, August 15, 1984)

COMMISSION DECISIONS

A keystone of the Act is good faith compliance. In t case respondent did not demonstate any statutory good fait because the violative conditions cited by Inspector Broome not abated until withdrawal orders were issued by MSHA Ins David Estrada on September 2, 1981 (Stipulation, paragraph

Considering the statutory criteria, and based on the record, I am unwilling to disturb the penalties proposed f these citations.

Based on the foregoing findings of fact and conclusio law I enter the following:

ORDER

The following citations and the proposed penalties th are affirmed:

Citation	Penalty
588681	$ 34
588682	72
588683	36
588715	195
588716	60
588717	60
588718	60
588719	44
588720	52

Respondent is ordered to pay to the Mine Safety and H Administration the total sum of $613 within 40 days of the of this decision.

John J. Morris
Administrative Law Judge

lliam A. VanWerven, President, Ferndale Ready Mix & Gravel,
5271 Creighton Road, Ferndale, Washington 98248 (Certified

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 2

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 84-142 A.C. No. 36-01965-03502
v.	:	Buck Run P045A Strip Min
READING ANTHRACITE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal file by the petitioner against the respondent pursuant to sectio of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(a), seeking a civil penalty assessment in the amount $10,000, for a violation of mandatory safety standard 30 C. § 77.704-1(b). The section 104(a) citation no. 2100028, was issued by an MSHA inspector on September 22, 1983, duri the course of an investigation of a fatal electrical accide in which a miner was electrocuted when he inadvertently cam into contact with an energized component at the mine power substation. The victim was part of an electrical crew performing work at the substation at the time of the accide

Respondent filed a timely answer contesting the citati and the case was scheduled for a hearing. However, the par have filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking my approval of a proposed settlement whereby the respondent agrees to pay a civil per in the amount of $5,000, in settlement of the violation.

and full disclosure as to the facts and circumstances surround the accident, as well as a complete explanation and justificat for the proposed reduction in the initial proposed civil penalty assessment. Included as part of the arguments in supp of the motion, are copies of (1) MSHA's official accident report of investigation; (2) a report prepared by the Westinghouse Electric Corporation concerning certain testing conducted in an attempt to assist in determining the location of the electrical discharge involved in the accident; (3) a sketch of the substation prepared during the course of the investigation; (4) a transcript of interviews and statements made by two of the electrical crew members who were working at the substation at the time of the accident; and, (5) an acc report prepared by a State of Pennsylvania Mine Electrical Inspector.

Petitioner asserts that the electrical crew performing the work at the substation in question were part of a qualifie crew consisting of a chief electrician, the accident victim, and two qualified electricians. The accident victim was a qualified electrician with six years experience in surface and underground electrical low, medium, and high voltage. The victim had suffered electrical burns to both his hands and in the center of his spine, but no one observed him contac live electrical parts, nor could anyone determine what electri parts he had contacted. Although the spare electrical circuit at which the victim and another crew member performed their work was deenergized, the main power substation structure alsc supported incoming power lines of 66,000 volts and a stepped down power line of 4160 volts which remained energized while the pair worked on the substation roof. The power lines and components were located at heights of approximately 4 1/2 to 15 feet and 30 feet above the roof level. The components closest to where the victim and his fellow crew member were working carried 4160 volts and were located 4 1/2 feet above the substation roof.

Petitioner points out that immediately prior to starting the work, the victim and his fellow crew member discussed the presence of the hot lines and that the victim stated "as long as we are careful, we're all right . . . well, we're not going to get near that" (Transcript, 9/27/83, interview with crew member, p. 14). Petitioner concludes that it was the judgment of the experienced electrical crew (and of the victim in particular) that the job tasks they were performing

an experienced crew of electrical workers set up a job which involved their own personal safety, and that the evidence suggests that these qualified electricians considered themselves to be safe as long as they worked carefully.

The information provided by the petitioner reflects that the respondent is a medium sized operator producing 336,1 production tons of coal annually as of April 1984, and 31, 942 tons annually at its Buck Run P-45A strip mine at the same tir

During the two year period from 9/22/81 to 9/21/83, respondent received only one violation from MSHA, a § 104(a) citation citing 30 C.F.R. § 48.28(a) and a civil penalty in the sum of $32.

The information provided by the petitioner also establish that good faith was demonstrated promptly by the respondent holding a meeting with electricians at which time proper switching and grounding procedures in accordance with the regulations were established.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approv the proposed settlement of this case, I conclude and find tha it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $5,000, in settlement of the citation in question, and payment is to be made to the petitioner within thirty (30 days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

September 20, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 84-31-M
	:	A.C. No. 04-00196-05502
v.	:	
	:	Docket No. WEST 84-35-M
MONOLITH PORTLAND CEMENT CO., Respondent	:	A.C. No. 04-00196-05504
	:	
	:	Docket No. WEST 84-56-M
	:	A.C. No. 04-00196-05505
	:	
	:	Monolith Cement Plant

DECISION

Appearances: Herbert Jay Klein, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Jim Day, Safety and Training Supervisor, Monolith Portland Cement Company, Monolith, California, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against Monolith Portland Cement Company for alleged violations of the mandatory safety standards.

Stipulations

At the hearing, the parties agreed to the following stipulations (Tr. 4):

1. The operator is the owner and operator of the subject mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction of these cases.

6. Imposition of any penalty will not affect operator's ability to continue in busines

7. The alleged violations were abated in goo faith.

8. The operator has a small history of prior violations.

9. The operator is moderately large in size.

WEST 84-31-M

Citation No. 2365907 sets forth the violative conditions or practices as follows:

> The area where employees eat lunch was not kept clean and orderly in the Lab building Several employees eating there were exposed to a fire hazard as well as a health hazard as the floor appeared unkempt.

30 C.F.R. § 56.20-3(a) provides as follows:

> At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

The parties stipulated to the facts set forth citation (Tr. 6). An over-filled trash bin presente definite fire hazard. However the Solicitor advised was now the Secretary's position that the operator guilty of moderate negligence rather than recklessne 6-7). The operator agreed that the occurrence of a reasonably likely because employees smoked in the a (Tr. 7). The violation was serious and the operato negligent. A penalty of $150 is assessed.

WEST 84-35-M

Citation No. 2086560 provides as follows:

> The passageway and working area of the 2 pier at the kiln had poor housekeeping and was not kept clean of tools and other materials Employees assigned tasks in this area could tri slip, r f . These areas (piers) ar travele

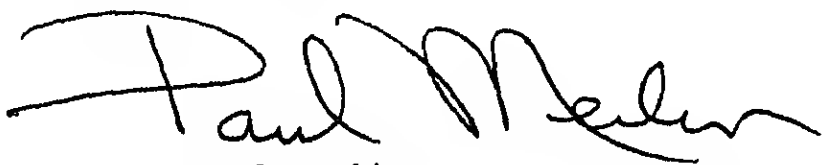
pe of accident which would occur would probably result in lost work day (Tr. 11). The violation was serious and the erator was negligent. A penalty of $200 is assessed.

WEST 84-56-M

The Solicitor moved to vacate the one citation involved this matter (Tr. 14). The Solicitor adequately explained e basis for vacating this citation and as I have held eviously in other cases, vacation of a citation and hdrawal of penalty petition with respect to it is within e Solicitor's discretion.

ORDER

It is Ordered that the operator pay $375 within 30 days the date of this decision.



Paul Merlin
Chief Administrative Law Judge

tribution:

chard L. Newman, Esq., Office of the Solicitor, U.S. partment of Labor, 3247 Federal Building, 300 North s Angeles Street, Los Angeles, CA 90012 (Certified il)

. J. F. Day, Safety Director, Monolith Portland Cement mpany, Monolith, CA 93548 (Certified Mail)

1

WASHINGTON, D.C. 20006

September 21, 1984

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. WEST 84-31- A.C. No. 04-00196-0550
v.	:	
MONOLITH PORTLAND CEMENT CO., Respondent	:	Docket No. WEST 84-35- A.C. No. 04-00196-0550
	:	Docket No. WEST 84-56- A.C. No. 04-00196-0550
	:	Monolith Cement Plant

AMENDED ORDER

The Order in the above-captioned case is amended to read "It is Ordered that the operator pay $350 within 30 days of the date of this decision."

Paul Merlin
Chief Administrative Law Judge

Distribution:

Richard L. Newman, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. J. F. Day, Safety Director, Monolith Portland Cement Company, Monolith, CA 93548 (Certified Mail)

/gl

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 83-95-M
	:	A.C. No. 21-00282-05508
v.	:	
	:	Minntac Mine
UNITED STATES STEEL CORPORATION, Respondent	:	
	:	Docket No. LAKE 83-100-M
	:	A.C. No. 21-00797-05501
	:	
	:	Minntac Warehouse
	:	
	:	Docket No. LAKE 84-5-M
	:	A.C. No. 21-00819-05502
	:	
	:	Docket No. LAKE 84-11-M
	:	A.C. No. 21-00819-05503
	:	
	:	Maintenance Department

DECISION

ppearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for violations of regulatory standards. The general issue before me is whether the United States Steel Corporation (U.S. Steel) has violated the regulations as alleged, and, if so, what is the appropriate penalty to be assessed in accordance with section 110(i) of the Act.

) Grant Street
ttsburgh, PA 15219

rry F. Wisor, Esq.
fice of the Solicitor
S. Department of Labor
15 Wilson Blvd.
lington, Virginia 22203

ministrative Law Judge James A. Broderick
deral Mine Safety & Health Review Commission
03 Leesburg Pike, 10th Floor
lls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

HARRISON WESTERN CORPORATION, Applicant	:	APPLICATION FOR REVIEW
	:	Docket No. CENT 81-249-
v.	:	Withdrawal Order No. 15
	:	Dated June 15, 1981
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mt. Taylor Mine

SUMMARY DECISION

Before: Judge Carlson

This case comes on for decision upon cross motions for summary decision filed by both parties under Commission Rul 2700.64. 1/ All facts are submitted by joint stipulation.

The case arose out of a withdrawal order issued by the Department of Labor's Mine Safety and Health Administration

---

1/ 29 C.F.R. § 2700.64 states in part:

(a) Filing of motion for summary decision. At any tim after commencement of a proceeding and before the schedulin hearing on the merits, a party to the proceeding may move t Judge to render summary decision disposing of all or part c proceeding.

(b) Grounds. A motion for summary decision shall be g only if the entire record, including the pleadings, deposit answers to interrogatories, admissions, and affidavits show (1) That there is no genuine issue as to any material fact; (2) that the moving party is entitled to summary decision a matter of law.

support of their respective motions for summary decision.

I conclude that no material facts are in dispute and case is ripe for summary decision.

ISSUE

The crucial issue to be decided is whether the issua the 107(a) withdrawal order challenged by Harrison Wester sustained in light of the prior issuance of 103(k) 4/ wit order covering the same area of the mine.

2/ A second order dated June 15, 1981 appears in the fil reasons fully explained in the stipulation. The second i substitution for the first. For the purposes of this dec the two are properly treated as one.

3/ As pertinent here, that section provides:

"Sec. 107(a) If, upon any inspection or investigation of or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent da exists, such representative shall determine the extent of area of such mine throughout which the danger exists, and an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to b withdrawn from, and to be prohibited from entering, such until an authorized representative of the Secretary deter that such imminent danger and the conditions or practices caused such imminent danger no longer exist. The issuanc order under this subsection shall not preclude the issuan citation under section 104 or the proposing of a penalty section 110.

4/ Section 103(k) of the Act provides:

In the event of any accident occurring in a coal or other an authorized representative of the Secretary, when pres issue such orders as he deems appropriate to insure the any person in the coal or other mine, and the operator o mine shall obtain the approval of such representative, i sultation with appropriate State representatives, when f

s decision. All exhibits mentioned in the stipulation are
ed to this decision. The stipulation, omitting caption and
ures, is as follows:

. Statement of the Case

his proceeding was commenced by Harrison Western
orporation ("Harrison"), pursuant to Section 107 of the
ederal Mine Safety and Health Act of 1977 (the "Act"),
or review of Section 107(a) Withdrawal Order No. 151337
ated June 15, 1981 (Exhibit "A" attached hereto),
ssued to it with regard to the Mt. Taylor Project
"Project") by the Secretary's authorized representa-
ive, Glenn C. Johnston. Harrison's Application for
eview was timely filed on or about July 15, 1981 and
he Secretary's Answer was timely filed on or about July
1, 1981.

ithdrawal Order No. 151337 replaced Section 107(a)
ithdrawal Order No. 151295 (Exhibit "B") issued at 2:00
.m. on October 3, 1979, also by Inspector Johnston.
he original Order named "Gulf Mineral Resources
Harrison Western, Inc.)" as operator and was sought to
e enforced by the Secretary against Gulf Mineral
esources Company ("Gulf") alone in Docket No. CENT
0-309-M. While that case was pending, the Secretary
evised his policy and regulations under the Act to
rovide for issuance of citations and orders to
roduction-operators and/or independent contractors. 30
FR, Part 45; 45 F.R. 44494, July 1, 1980. As a result
f this policy change and an agreement between the
ecretary and Harrison, Withdrawal Order No. 151337 was
ssued to Harrison on June 15, 1981, on the basis that
arrison would have access to all applicable formal and
nformal review procedures. Thereafter, motions to
acate Withdrawal Order No. 151295 and to dismiss Docket
o. CENT 80-309-M were granted by the Administrative Law
udge assigned to that proceeding.

ince Order No. 151337 replaced Order No. 151295, they
re virtually identical in all material respects, except
nly that Harrison is named alone as the operator in
rder No. 151337. The facts which underly and determine
he validity of Order No. 151295 are likewise the facts
hich underly and determine the validity of Order No.

the Project was a uranium mine in the constructio
Gulf was the owner of the Project. Harrison was
primary contractor for the shaft sinking portion
construction. The Project was located approximat
mile north of San Mateo, Valencia County, New Mex
and was subject to the Act.

The shaft sinking operation consisted of excavati
parallel, vertical shafts, one twenty-four feet i
diameter and the other fourteen feet in diameter.
two shafts were horizontally separated by a dista
about 400 feet and were connected by horizontal t
located at depths of approximately 700 feet, 1,60
2,600 feet, 3,100 feet and 3,200 feet. The plann
total depth of both shafts was 3,300 feet. The p
elements of the shaft sinking operation included
excavation, pouring a concrete liner around the
circumference of each shaft, installation of air,
and power lines, installation of hoist and other
transportation systems, and construction of opera
stations in the horizontal connecting tunnels wit
installation of associated equipment to be used i
mining process.

B. 24-Foot Shaft.

On October 3, 1979, the 24-foot shaft had been su
depth of approximately 3,240 feet. A 220-foot hi
headframe was located above the shaft on the surf
contained the hoist equipment and control room.
collar was installed at the surface which complet
covered the shaft when its retractable, horizonta
were shut. The doors were opened only to allow p
of men and materials by way of the hoisting mecha
Two subcollars of a similar nature were located i
shaft a short distance below the main collar.

The lower deck of a three-deck Galloway was loca
the 3,200-foot level near the bottom of the shaf
October 3, 1979. The Galloway was the working pl
from which excavation, muck removal and concrete
pouring was performed. It was suspended by four
wire ropes from the hoisting mechanism located i
headframe on the surface.

dframe. Each was guided by a crosshead which
velled vertically along one pair of the wire ropes
pending the Galloway. In this manner, one bucket
velled along the east side of the shaft (No. 1) and
other travelled along the west side (No. 2). The
e rope suspending each bucket was attached to the
ket by a shackle assembly which was detachable.

wo-deck "chippy cage" travelled along wooden guides
ached to the concrete perimeter liner on the north-
side of the shaft. This cage was similar to a
ll, rectangular elevator enclosed by a combination of
ded steel plates and heavy wire mesh. It was
pended from the headframe on the surface by a 1-3/8
n nonrotating wire rope, and was used for trans-
ing men and performing repairs along the shaft
imeter.

basket" had been fabricated at the site for use in
sting and lowering material and performing repair
k in the shaft. It was made of 1/2-inch steel plate
was 4-feet square with sides 42 inches high. At the
face, it could be attached to the shackle assembly of
her bucket hoisting cable by four 1-inch wire ropes,
n 10 feet long. The other end of these four ropes
ld be attached to the top corners of the basket by
ckles. When the basket was attached in this manner
place of one of the buckets, and with the crosshead
ired in the headframe, the basket could be swung the
rt distance to the perimeter of the shaft for repair
k. When the basket was attached in this manner and
pended freely without being swung to the perimeter,
horizontal distance between it and the "chippy cage"
17 feet.

8-inch diameter "slickline" pipe was installed verti-
y in the shaft at the perimeter adjacent to the
ippy cage." Directly opposite from the "slickline,"
2-inch compressed air line was installed vertically
the perimeter of the shaft. Both of these lines
ended from the surface to virtually the bottom of the
ft.

III. Events of October 3, 1979, Up To and Includ the Accident

The crew assigned to work in the 24-foot shaft o October 3, 1979 was under the general supervisio Wayne Thomas, whose title was "walker." This po was equivalent to that of general foreman for th ground shaft sinking operation. Stanley Henry w "shaft leader" of the crew, which is a position lent to foreman. The crew working at Henry's di in the shaft on that day consisted of Bob Hales, Castillo, Jack Mathieu, David Stovall and Michae These five men held the designation of either sh miner or operator, which were roughly equivalent positions with small wage differentials. All we Harrison employees.

This group met in the construction trailer on th surface to receive directions for the day's work start of the shift (approximately 7:30 a.m.) on 3, 1979. Thomas directed Henry to have four men aligning the "slickline" starting at about the 2 level of the shaft, using the "chippy cage" as a platform. Henry directed Castillo, Mathieu, Sto Borody to perform this work in pairs. Because o strenuous nature of the work and the limited are "chippy cage" platform, each pair was to work in alternating two-hour shifts, with the off pair r at the 2600-level station. Thomas' initial assi for Henry and Hales was to remove muck from the of the shaft.

Henry and his shaft crew commenced the work as a shortly after 8:00 a.m. Later that morning, Tho to the bottom of the shaft where Henry and Hales working to change their assignment. He directed install several valves at various points along t length of the 12-inch air line. After shutting air supply to the line and opening a valve to bl pressure from it, Thomas, Henry and Hales came t surface in the No. 2 bucket. While Thomas atten other matters, Henry and Hales gathered together tools and materials needed to install the valves the assistance of the toplanders (Harrison emplo

groups waived [sic] their lights and shouted to each other.

Henry and Hales had their backs to each other as the basket descended through about the 2900-foot level at approximately 11:25 a.m. At that point, Hales heard a dull thump and turned to see Henry falling into the corner of the basket. Hales signalled to the hoistman on the surface to stop their descent. He then checked Henry for life signs and found none. He then signalled to the hoistman to bring them to the surface. When they reached the surface, Henry was examined by one of the toplanders who was a paramedic. No vital signs were detected. Henry was taken by ambulance to a nearby hospital in Grants, New Mexico, and pronounced dead on arrival at 12:04 p.m.

IV. Accident Investigation and Order at Issue in this Proceeding

The federal and state mine safety agencies were notified of the accident immediately after the basket reached the surface and Hales was able to inform surface personnel of what had happened. Notification to MSHA was received by the Albuquerque field office at 11:40 a.m. At 11:45 a.m., Inspector Johnston issued Withdrawal Order No. 151293 under Section 103(k) of the Act (Exhibit "C") "to prevent the destruction of any evidence that may be of assistance in investigating the accident and to assure safety of all persons in or near the accident area until the investigation is complete, ..." The area to which that Order applied was described as:

> 24 ft. diam. shaft, approximately on 2950 foot level in #2 bucket position ...

This Order was not modified in any manner until 8:35 p.m. that evening.

Upon learning of the accident and the Section 103(k) Order, Harrison's safety engineer, David Wolfe, directed all concerned not to disturb any evidence related to the accident and to remove the remaining men from the 24-foot shaft. Accordingly, Castillo, Mathieu, Stovall and Borody, came to the surface by means of the "chippy cage."

examining the collar, basket and "chippy cage" at the surface, they descended into the 24-foot shaft by means of the "chippy cage." They found a 4 1/2-pound steel wedge on the top deck of the Galloway, which was approximately 36 feet above the bottom deck. They also found [illegible] hard hat with a hole in it at the bottom of the shaft below the Galloway. It was determined that Castillo and Mathieu had been using the wedge at the 2400-foot level to hold the "slickline" away from the concrete lining of the shaft. The safety rope which was tied by a double knot through a 3/4-inch nut welded to the wedge had been broken. Castillo and Mathieu had discovered the rope missing at about the time of the accident when they pulled on the safety rope and found only the frayed ends.

It was, therefore, concluded from the investigation that Henry had been struck by the wedge at approximately the 2950-foot level when it became detached in an unknown manner and fell from the 2400-foot level. It was further determined that neither the "chippy cage" nor the basket was provided with a bonnet or other overhead protection at the time of the accident.

In the early stages of the on-site accident investigation, Inspector Johnston issued Section 107(a) Withdrawal Order No. 151295 at 2:00 p.m. on October 10 (Exhibit "B") on the basis of his determination that an imminent danger under the Act existed. Inspector Johnston described the area to which the Order was applicable as "24 ft. shaft, #2 bucket position at 2950 feet below collar of shaft." The "condition or practice" recited in the Order was as follows:

> At approximately 1125 hours on 10-3-79, a fatal accident occurred in the 24-foot diameter shaft. The victim and his partner were being lowered in a conveyance that did not have a protective bonnet installed. An object from above struck the victim on the head at a point 2950 ft. (approx.) below the collar of shaft. A two-man crew was working approximately 500 ft. (about the 2400-foot level) above the unprotected conveyance of the victim and his partner, mentioned above

drawal order is invalid because the essential element of an inent danger" was absent at the time the order was issued. was so, according to the applicant, because all miners who ibly would have been harmed had already been removed from the dous area. Also, the basket and the "chippy cage," which inherent parts of the hazard, had been moved to the surface. equently, the argument proceeds, no imminent danger "existed" in the meaning of section 107(a). Moreover, the miners were ady afforded protection by virtue of a previously issued k) order.

Before going further we must examine the concept of an inent danger." Section 3(j) of the Act defines the term as

> ... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

s dealing directly with the notion of "imminence" are in al agreement that the danger must be one which can cause ous physical harm at any time, but not necessarily diately.[5]/

In its opening brief Harrison Western urges that since its the basket and the cage were all on the surface when the ector arrived, we are presented with "... a typical case in the inspector issued a withdrawal order based on prior umstances which he claimed had constituted an imminent er, but which no longer existed." [6]/ It is true that nent danger withdrawals may not be issued for past dangers. er the Commission nor its predecessor, the Interior Board of Operations Appeals, however, has ever suggested that an ent danger vanishes simply because miners are moved where or mobile equipment is moved. The danger remains a er subject of an order until the underlying condition giving to the danger is corrected. In Eastern Associated Coal . v. Interior Board of Mine Operations Appeals, 491 F. 2d 277 Cir. 1974), where miners were voluntarily withdrawn from a erous area before a withdrawal order was issued under section

---

See, e.g. Old Ben Coal Corporation v. Interior Board of Mine

before the dangerous condition is eliminated. The rea
behind such a principle is clear. Where miners are vol
withdrawn by an operator they may just as easily be ord
before abatement is complete. An order by an authorize
sentative of the Secretary of Labor, on the other hand,
legal force which forbids return of a workforce before
underlying hazard is eliminated.

Harrison Western, in its excellent briefs, speaks
to the fact that the fatality in the present case took
about 11:25 a.m. but the inspector did not issue his in
danger withdrawal order until 2:00 p.m., a time after
were out of the shaft and the cage and basket were at
To the extent that applicant thus appears to suggest th
alone vitiated the 107(a) order because the imminent da
longer "existed," the suggestion is wholly without mer
"normal mining" (in this case shaft construction) were
it must be inferred that miners would continue to work
hoist conveyances which were not equipped with protect
overhead. 8/

In sum, Harrison Western has simply taken too narr
view of the concept of a hazard or "danger" as embodied
The applicant stresses the inspector's highly literal
of the circumstances leading to the accident and then
that since none of those circumstances existed at 2:00
hazard had been "eliminated." On the contrary, the dan
the very nature of the work to be done and the fact tha
were doing that work without protection from falling ob
Such a danger does not cease within the contemplation
107(a) merely because miners come to the surface or go
the night.

7/ Section 104(a) of the 1969 Act is in all significan
identical to section 107(a) of the 1977 Act.

8/ The record shows that a protective bonnet was insta
on the day following the accident. (See stipulated exh

under 103(k), may he legitimately superimpose a 107(a) immine danger withdrawal order? Put another way, can there be an "imminent danger" where miners already have been ordered out, voluntarily by a mine operator, but by a representative of th Secretary of Labor acting under the authority of the Act?

In such a case it cannot be said, as with a wholly volun withdrawal, that exposure of the miners could reoccur at the of the employing operator or contractor. Thus, one can const an argument that a subsequent 107(a) order issued while a 103 order remains in effect is invalid because the prior 103(k) c nullifies any realistic possibility of injury to miners and t any "imminent danger."

This argument, too, must be rejected. To understand why one merely need look to how 103(k) and 107(a) fit into the statutory enforcement scheme. Their purposes differ. Sectio 103(k) confers broad emergency powers upon the Secretary to t charge of an accident scene and, in the words of the statute, "... issue such orders as he deems appropriate to insure the safety of any person ...." See Roscoe Page v. Valley Camp Cc Co., 6 IBMA 1 (1976).

A 107(a) order, on the other hand, is more limited and m closely focused. It may issue only upon a specific determina of an "imminent danger" and, once issued, remains in effect t protect miners until the conditions constituting the danger a corrected. When a 103(k) order is issued the cause of the accident is often unknown until the Secretary's investigation discovers it. Moreover, investigation may not disclose an imminent danger at every accident scene. It is wholly proper however, for inspectors to proceed to issue a 107(a) order wh an imminently dangerous condition is found, even though a 103 order may already be in effect. Itmann Coal Company, 1 FMSHR 1573 (1979). This is so, if for no other reason, because the accident investigation may be completed and all rescue and ot accident exigencies dealt with long before the conditions constituting an imminent danger are corrected. In that event 103(k) order would likely be ripe for termination while a 107 order should remain effective to accomplish its narrower and specific aims. Thus, once the Secretary properly determines

existence of an imminent danger. The issuance of the 107 withdrawal order was therefore proper. Consequently, the respondent Secretary's motion for summary decision will b granted, and Harrison Western's motion for the same relie be denied.

ORDER

In accordance with the foregoing, the applicant's mo summary decision is DENIED, respondent's motion for summa decision is GRANTED and the withdrawal order issued by th respondent under section 107(a) of the Act is ORDERED AFF

John A. Carlson
Administrative Law Judge

Distribution:

Eloise V. Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Suite 501, Dalla Texas 75202 (Certified Mail)

Richard L. Fanyo, Esq., Welborn, Dufford & Brown, 1700 Br Denver, Colorado 80290-1199 (Certified Mail)

/blc

...VES TO Guy Mills OPERATOR Harrison-Western Corpor...
...Mt. Taylor Mine MINE ID 29-01175-T35 (CONTRACT...
...E OF ACTION 104-a VIOLATION OF SECTION ____ OF THE ACT...
...REVERSE) ...
...T AND SECTION 57.19-45 OF TITLE 30 CODE OF FEDERAL REGULATIONS.
...E OF INSPECTION 030 ☒ SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

...DITION OR PRACTICE On Oct 3 1979 at approx hours it was observed that at appr... hours, a fatal accident occurred in the 24 foot diameter shaft... partner were being lowered in a conveyance that did not have a pr... installed. An object from above struck the victim on the head at... feet (approx) below the collar of the shaft. A two-man crew was wor... approximately 200 ft (about the 7400 foot level), above the unprotected conv...
...A OR EQUIPMENT 24 ft. shaft #2 bucket position, approx 7950 feet below co... shaft

...IAL ACTION ☐ NOTICE ☐ CITATION ☐ ORDER NO. ____ DATED ____/____/____ (MO / DA)
...MINATION DUE DATE ____/____/____ (MO / DA / YR) TIME ____ (24 HR CLOCK) SIGNATURE
...ION TO TERMINATE condition no longer exists. Order No. 151295 was terminated 10-19-... 8 hours. Bonnet installed. Work practices republished and implemented.
...E 06/15/81 (MO / DA / YR) TIME 0800 (24 HR CLOCK) SIGNATURE [signature] TITLE ...AR ☒ SEE SUB... ACTION

...D STATES DEPARTMENT OF LABOR
...AFETY AND HEALTH ADMINISTRATION NO. 151337 DATED 06/15/...
...ORM 7000-3a (3-78)
...UBSEQUENT ☒ CONTINUATION ☐ CITATION ☒ ORDER DATE 06/15/81 (MO / DA / YR) TIME 0800 (24 HR CLOCK)
...D TO Guy Mills OPERATOR Harrison-Western Corpor...
...Mt. Taylor Mine MINE ID 29-01325-T35 (CO...
...ICATION FOR ACTION CHECKED BELOW
...e victim and his partner mentioned above.
...Safe shaft work practices shall be implemented, published to em... ployees and observed.

...XTENDED TO: DATE ____/____/____ (MO / DA / YR) TIME ____ (24 HR CLOCK) ☐ VACATED DATE ____/____/____ (MO / DA / YR) TIME ____ (24 H...
...ERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET
...YPE OF INSPECTION 030 SIGNATURE [signature]

RVED TO [illegible]

INE Mount Taylor Project MINE I.D. 29-01375 - - - (CONTRAC

YPE OF ACTION (SEE REVERSE) 107-a - - - - VIOLATION OF SECTION - - - - - - OF THE AC

ART AND SECTION 57 - 19 - 45 OF TITLE 30 CODE OF FEDERAL REGULATIONS.

YPE OF INSPECTION [illegible] ☒ SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

CONDITION OR PRACTICE At approximately 425 hours on 10-3-79, a fatal accident occurred in the 24-foot diameter shaft. The victim and his partner were being lowered in a [illegible] that did not have a protective bonnet installed. An object from above struck the victim on the head at a point 2951 ft (approx) below the collar of the shaft.

AREA OR EQUIPMENT 24 ft. shaft #2 bucket position approx 295[illegible] below collar of shaft.

INITIAL ACTION ☐ NOTICE ☐ CITATION ☐ ORDER NO. ______ DATED __ / __ (MO. DA)

TERMINATION DUE DATE __ / __ / __ (MO DA YR) TIME ______ (24 HR CLOCK) SIGNATURE [signature]

ACTION TO TERMINATE

DATE __ / __ / __ (MO DA YR) TIME ______ (24 HR CLOCK) SIGNATURE ______ AR ☐ SEE ACTIO

MO DA YR (24 HR CLOCK)

TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison-

Mount Taylor Project MINE I.D. 29-01375 - _ _ _ (CO

CATION FOR ACTION CHECKED BELOW ... two-man crew was work-
... approximately 500 ft (about the 2000 foot level) above
... unprotected conveyance at the victim and his p...
... mentioned above.

Safe shaft work practices shall be im-
plemented, published to employees, and followed.

EXTENDED TO. DATE __/__/__ TIME __ (24 HR CLOCK) ☐ VACATED DATE __/__/__ TIME __ (24 H

TERMINATED ☐ MODIFIED ☒ SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 43C

SIGNATURE Glenn Johnston

UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
FORM 7000-3a (3-78)

No. 151295 - _ DATED 10/03/7

SUBSEQUENT ACTION ☐ CONTINUATION ☒ CITATION ☐ ORDER DATE 10/29/79 TIME 153 (24 HR CLOCK)

TO Dave Wolfe OPERATOR Gulf mineral Resources (Harrison

Mount Taylor Project MINE I.D. 29-01375 - _ _ _ (CONT

JUSTIFICATION FOR ACTION CHECKED BELOW A protective bonnet was inst...
the basket on 10-4-79 at 1230 hrs. Safety
work practices were published and implemented to
employees.

EXTENDED TO. DATE __/__/__ TIME __ (24 HR CLOCK) ☐ VACATED DATE __/__/__ TIME __ (24 HR

TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

D STATES DEPARTMENT OF LABOR
SAFETY AND HEALTH ADMINISTRATION
FORM 7000-3a (3-78)

No 151295-2 DATED 10/03/
MO DA

SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 11/02/79 TIME 1300
MO DA YR (24 HR CLOCK)

ED TO Dave Wolfe OPERATOR Gulf Mineral Resources Co Kerr-McGee West
Mount Taylor Project MINE I.D. 29-01375-___ (CON

FICATION FOR ACTION CHECKED BELOW
The Termination to the above numbered order is hereby modified
to show an X in the Order box and not the Citation Box

XTENDED TO: DATE ___/___/___ TIME ____ ☐ VACATED DATE ___/___/___ TIME
MO DA YR (24 HR CLOCK) MO DA YR (24 HR

ERMINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

YPE OF INSPECTION 03C SIGNATURE Julian Kennedy

TATES DEPARTMENT OF 80
ETY AND HEALTH ADMINISTRATION
RM 7000-3a (3-78)

No 151295-- DATED 10/03/7
MO DA YR

SSEQUENT ION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 11/26/79 TIME 0900
MO DA YR (24 HR CLOCK)

TO Dave Wolfe OPERATOR Gulf Mineral Resources/Kerr-McGee W
Mount Taylor Project MINE I.D. 29-01375-- (CONTR
Gulf Mineral
ATION FOR ACTION CHECKED BELOW This is to modify the modificat
the Abatement of Order # 151295. (Modification w
ed 11-02-79 @ 1234 hrs).
1. The modification was to modify the abatement of the ord
not the order.
2. To mark the order box instead of citation b
abatement and to change type of inspection from
to 03 because the abatement was made on a regu
spection.

ENDED TO: DATE ___/___/___ TIME ____ ☐ VACATED DATE ___/___/___ TIME
MO DA YR (24 HR CLOCK) MO DA YR (24 HR C

MINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

D TO Gay Mills
Mount Taylor Project MINE I.D. 29-01375-J35 (CON

IFICATION FOR ACTION CHECKED BELOW
This is To Change the name of the operator To Harrison Western Corporation and to add the Contractor num
(J35)

EXTENDED TO: DATE MO / DA / YR TIME (24 HR CLOCK) ☐ VACATED DATE MO / DA / YR TIME (24
TERMINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET
TYPE OF INSPECTION 030 SIGNATURE Glenn C. Johnston

ED STATES DEPARTMENT OF LABOR
AFETY AND HEALTH ADMINISTRATION NO. 151295- DATED 10/03
A FORM 7000-3a (3-78)
SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 06/15/81 TIME 080
VED TO Gay Mills OPERATOR Harrison-Western Corp
E Mt. Taylor Mine MINE I.D. 29-01375-J35 (C
TIFICATION FOR ACTION CHECKED BELOW
rder No. 151295, issued to G.M.T. Mineral Resources on
October 3, 1979, is vacated and replaced by order No. 15
ssued to Harrison-Western Corporation, I.D. No. 29-01375-

EXTENDED TO: DATE MO / DA / YR TIME (24 HR CLOCK) ☒ VACATED DATE 06/15/81 TIME (24
TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET
TYPE OF INSPECTION 030 SIGNATURE Glenn C. Johnston

CONDITION OR PRACTICE Approximately 1125 hours on 10/23/79 a fatal ... occurred in the 24 foot shaft. This order is issued to preven[t] ...struction of any evidence that may be of assistance in inve[stigatin]g the accident and to assure safety of all persons in [th]e accident area until the investigation is complete ... the cause of the accident have been determined.

AREA OR EQUIPMENT 24 ft Diam. Shaft approximately on 2950 foot ... on #2 bucket position victim was a Harrison Western emp...

INITIAL ACTION ☐ NOTICE ☐ CITATION ☐ ORDER NO. ______ DATED __/__ (MO / DA)

TERMINATION DUE DATE __/__/__ (MO / DA / YR) TIME ______ (24 HR CLOCK) SIGNATURE Glenn Johnston

ACTION TO TERMINATE

DATE __/__/__ (MO / DA / YR) TIME ______ (24 HR CLOCK) SIGNATURE ______ AR ☐ SEE SU[BSEQUENT] ACTIO[N]

[UNIT]ED STATES DEPARTMENT OF LABOR
[MINE] SAFETY AND HEALTH ADMINISTRATION
FORM 7000-3a (3 78)

No. 151293-1 DATED 10/03/ (MO / DA)

SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/23/79 (MO / DA / YR) TIME 2 0 ... (24 HR CLOCK)

[SERV]ED TO Tina Manzanares OPERATOR Gulf Mineral Resources

Mount Taylor Project MINE I.D. 29-01375 - ___ (CON...)

[JUST]IFICATION FOR ACTION CHECKED BELOW This modifies order #151293 a[s] [fol]lows: The chippy cage and hoist shall not be used [ex]cept in a safety emergency. The galloway may be raised ... [e]ffect, but not used or worked on. The double drum hoist [and] buckets may be used to hoist & lower men and to [ma]ke repairs on 16, 24 and 31 shaft stations. No w[ork] shall be done within the 24 foot shaft on pipe li[ne] [or] slick line. Muck may be hoisted from the ... bottom.

[TIME] EXTENDED TO: DATE __/__/__ (MO / DA / YR) TIME ______ (24 HR CLOCK) ☐ VACATED DATE __/__/__ (MO / DA / YR) TIME ______ (24 H[R CLOCK])

[T]ERMINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 030 SIGNATURE Glenn Johnston

EXHIBIT "C"

STATES DEPARTMENT OF LABOR
FETY AND HEALTH ADMINISTRATION
ORM 7000-3a (3 76)

No 15/293-2 DATED 10/23/79
MO DA YR

BSEQUENT TION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/24/79 TIME 1144
MO DA YR (24 HR CLOCK)

D TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison
Mount Taylor Project MINE I.D. 29-01375- ICO
CATION FOR ACTION CHECKED BELOW This is to modify order #15/29
the first modification of order #15/293, is foll

ervied To Dave Wolfe

Operator Gulf Mineral Resources (Harrison Western

This is also modified order #15/293 as follows: The chippy
and hoist may be used for man transportation and ma
terials. But no maintenance or repair may be done at it

TENDED TO: DATE MO / DA / YR TIME (24 HR CLOCK) ☐ VACATED DATE MO / DA / YR TIME (24 H
☐ SEE SUBSEQUENT ACTION SHEET

RMINATED ☒ MODIFIED

PE OF INSPECTION 020 SIGNATURE Steven C. Hunter

STATES DEPARTMENT OF LABOR
AFETY AND HEALTH ADMINISTRATION
ORM 7000-3a (3 78)

No 29 15 293- DATED 10/23/79
MO DA YR

UBSEQUENT CTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/10/79 TIME 1603
MO DA YR (24 HR CLOCK)

D TO Dave WOLFE OPERATOR GULF MINERAL RESOURCES (HARRISON
MOUNT TAYLOR PROJECT MINE I.D. 29-01325- ICO
ICATION FOR ACTION CHECKED BELOW THE INVESTIGATION OF THE FATAL accident i
plete.

TENDED TO: DATE MO / DA / YR TIME (24 HR CLOCK) ☐ VACATED DATE MO / DA / YR TIME (24 HR
☐ SEE SUBSEQUENT ACTION SHEET

RMINATED ☐ MODIFIED

PE OF INSPECTION 030 SIGNATURE Steven C. Hunter

ROBIN D. MULLEN, Complainant	:	DISCRIMINATION PROCEE
	:	Docket No. SE 82-57-D
	:	CD 82-30
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: Larry Moorer, Esq., Birmingham, Alabama, for the Complainant.
Fournier J. Gale, III, Esq., Birmingham, Alabama, for the Respondent.

Before: Judge Fauver

On June 11, 1982, Robin D. Mullen, Complainant, fi a discrimination complaint with the Mine Safety and Hea Administration (MSHA), United States Department of Labo against Jim Walter Resources, Inc., Respondent, under s 105(c) of the Federal Mine Safety and Health Act of 197 30 U.S.C. § 801, et seq. Complainant alleged that she the subject of certain discriminatory actions on August 1980, February 11, 1982, and April 23, 1982. Complaina alleged that she had been discriminated against "by pay job placement, I've been harassed by being accused of r to work in an unfit manner . . . by foremans [sic] comi to my work area with their lights out and sexual harras [sic]." MSHA investigated her complaint and found ther was no violation of section 105(c) of the Act. Thereaf Complainant filed the Complaint in this proceeding. Af the Complaint was filed, Complainant alleged that anoth discriminatory act occurred on December 7, 1982.

A hearing on her Complaint was held in Birmingham, Alabama, on November 14 and 15, 1983. Both parties wer represented by counsel. Complainant called eight witne and introduced six exhibits, all of which were received evidence. Respondent called three witnesses and introd eight exhibits, all of which were received in evidence

1. Complainant, at the time of hearing, November 14-15, 1983, had been employed by Respondent at Number Four Mine for about 4-1/2 years. Number Four Mine, at all times releva produced coal for sale or use in or affecting interstate commerce.

2. In late 1981 and early 1982, on at least three occasions, Complainant observed or experienced conditions in the mine which she considered to be unsafe and reported those conditions to her supervisor. In each instance Complainant was relieved from exposure to the condition which she considered unsafe. I do not find discrimination in the way Respondent handled any of these safety complaints.

3. On February 11, 1982, Complainant reported to work at about 3:00 p.m. in a condition indicating by specch, appearance, and mannerisms, that she was under the influence of alcohol or some other drug. Her supervisors advised her, for her own safety and the safety of others, that she did not appear fit for duty and would not be allowed to work that day unless she submitted to an examination at the Brookwood Medical Clinic (a nearby facility where Respondent regularly had medical services performed) and the doctors there found her to be fit for duty. She was also told that if she was found fit for duty she would be paid for her entire shift that day. Complainant refused to go to the Brookwood Clinic for examination, but much later that day went to her private physician for a blood test for alcoho which was conducted about 6:30 to 7:00 p.m. That test showed Complainant's blood alcohol level to be .03 percent. Because of Complainant's apparent unfit condition and her refusal to submit to an examination at Brookwood Clinic, Respondent suspended Complainant for two days without pay.

4. At the direction of the Judgc, a pathologist's opinion was obtained after the hearing, with opportunity for both partics to comment on the opinion. The pathologist, Thomas J. Alford, M.D., answered a hypothetical question based on the testimony in this casc, finding it probable that Complainant's blood alcohol concentration at 3:00 p.m., on February 11, 1982, was 0.11 (110 mgm. percent) and that sh would therefore be legally considered under the influence of alcohol at that time.

to require her to submit to a blood alcohol test at Brookwood Clinic at Respondent's expense and, because of her failure to do so, to suspend her two days for reporting for work in an unfit condition and failing to submit to such a test. By delaying a blood alcohol test until 6:30 or 7:00 p.m., Respondent caused a lower showing of blood alcohol content than would have been shown had she been tested around 3:00 p.m. I find nothing discriminatory in Respondent' treatment of Complainant on February 11, 1982.

6. Complainant filed a grievance under Article XXIII, Section (b)(2) of the National Bituminous Coal Wage Agreement of 1981, concerning Respondent's discipline of her for the February 11, 1982, incident. The grievance went to arbitrati After an arbitration hearing the arbitrator found the facts against Complainant.

7. In April 1982, Complainant bid on a vacancy for a motorman position. The job was awarded under the procedures of the collective bargaining agreement to a miner who was senior to Complainant and who had better experience and qualifications for the motorman job than Complainant. Complainant filed a grievance over this matter, but withdrew her grievance at the third step in the grievance procedure. I find no discriminatory intent or action in Respondent's decision in filling the motorman vacancy.

8. On December 7, 1982, Complainant was disqualified from the position of motorman. I find that she was disqualif from that position because the company in good faith determin that she could not perform all of the required duties of the motorman job, and that this decision by the company was nondiscriminatory and supported by ample facts. Complainant filed a grievance over this disqualification, and the grievan went to arbitration. After an arbitration hearing, the arbitrator found the facts against Complainant.

DISCUSSION WITH FURTHER FINDINGS

Complainant alleges in her Complaint that she was discriminated against on August 16, 1980. However, there was no evidence of this alleged act of discrimination. This charge will be dismissed for lack of proof. Also, this allegation is time-barred by section 105(c)(2) of the Act, which will be discussed later.

I also find that Complainant's allegations as to this ncident and the August 16, 1980, incident, are barred by ne 60-day requirement of section 105(c)(2).

> Section 105(c)(2) of the Act states:
>
> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

In the June 11, 1982 complaint filed with MSHA Complainant leged that she was discriminated against on August 16, 980, February 11, 1982 and April 23, 1982.

The claims for alleged acts of discrimination occurring n August 16, 1980, and February 11, 1982, are barred by ection 105(c)(2) unless Complainant can show that the ling was delayed under justifiable circumstances. Joseph W. erman v. IMCO Services, 4 FMSHRC 2135 (1982), and David Hollis Consolidation Coal Company, 6 FMSHRC 21 (1984). Complainant dmitted being aware of her MSHA rights in February or March 1982, but failed to file her complaint for at least three onths after having this actual knowledge. I find that omplainant has not shown justifiable circumstances for ntimely filing, and on that independent ground her allegations discrimination on August 16, 1980, and February 11, 1982, hould be dismissed.

Thus, I find against Complainant as to the merits and dependently under the limitations period as to her allegations discrimination on August 16, 1980, and February 11, 1982.

As stated in the Findings, I find no showing of discriminat to Respondent's award of the motorman vacancy on April 23, 19 have noted also that Complainant withdrew her grievance the third step as to this matter.

Although the arbitration decisions are not binding this proceeding, I find that the arbitration decisions denying Complainant's claims as to the February 11, 1982 incident and the December 7, 1982, incident are thorough well-reasoned, and are entitled to substantial weight in this proceeding.

Complainant has shown no connection between her saf complaints or other protected activity and Respondent's actions on February 11, 1982, April 23, 1982, and Decemb 1982. The evidence overwhelmingly shows that she was disciplined on February 11, 1982, because she violated t collective bargaining agreement by reporting to work in unfit condition and that the actions by Respondent on Ap 1982, and December 7, 1982, were taken pursuant to the provisions of the collective bargaining agreement and we in no part motivated by protected activity by Complainan

CONCLUSIONS OF LAW

1. The Judge has jurisdiction over this proceeding

2. Complainant has failed to meet her burden of pr a violation of section 105(c) of the Act with respect to matter raised in her complaint or at the hearing.

3. On an independent ground, Complainant's allegat of discrimination on August 16, 1980, and February 11, 1 are barred by the 60-day limitation of section 105(c)(2) the Act.

All proposed findings and conclusions inconsistent the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DI

William Fauver
William Fauver
Administrative Law J

Birmingham, AL 35203 (Certified Mail)

Stan Morrow, Esq., P.O. Box C79, 2121 Building, 2121 Eighth Avenue, North, Birmingham, AL 35203 (Certified Mail)

George Palmer, Esq., U.S. Department of Labor, Office of the Solicitor, 1929 South Ninth Ave., Birmingham, AL 35205 (Certified Mail)

Larry Moorer, Esq., Newton & Tucker, Suite 1722, 2121 Bldg., 2121 8th Avenue, North, Birmingham, AL 35203 (Certified Mail)

/slk

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 7 19

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEED
	:	Docket No. CENT 84-5
	:	A.C. No. 34-01357-035
v.	:	
	:	Docket No. CENT 84-16
TURNER BROTHERS, INC., Respondent	:	A.C. No. 34-01357-035
	:	Welch Mine No. 1
	:	
	:	Docket No. CENT 84-27
	:	A.C. No. 34-01317-035
	:	
	:	Docket No. CENT 84-44
	:	A.C. No. 34-01317-035
	:	
	:	Heavener No. 1 Mine

DECISIONS

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dall Texas, for the Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklaho for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals f by the petitioner against the respondent pursuant to sec 110(a) of the Federal Mine Safety and Health Act of 1977 30 U.S.C. 820(a), seeking civil penalty assessments for alleged violations of certain mandatory safety and healt standards found in Parts 71 and 77, Title 30, Code of Fe Regulations.

Respondent filed answers contesting the proposed penalties, and hearings were held in Muskogee, Oklahoma, on July 10, 1984. The parties waived the filing of post hearing proposed findings and conclusions. However, all

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

ISSUES

The principal issues presented in these proceedings are whether respondent has violated the provisions of the Act implementing regulations as alleged in the proposal for essment of civil penalties, and, if so, (2) the appropriate il penalty that should be assessed against the respondent the alleged violations based upon the criteria set forth section 110(i) of the Act. Additional issues raised by parties are identified and disposed of where appropriate the course of these decisions.

In determining the amount of a civil penalty assessment, tion 110(i) of the Act requires consideration of the following teria: (1) the operator's history of previous violations, the appropriateness of such penalty to the size of the iness of the operator, (3) whether the operator was negligent, the gravity of the violation, and (6) the demonstrated good th of the operator in attempting to achieve rapid compliance er notification of the violation.

pulations

The parties stipulated that the respondent's surface ipping coal operations affect interstate commerce, and that the ing operations are subject to the Act. The parties also pulated that the respondent is a small-to-medium sized mine rator and that the assessment of reasonable civil penalty essments will not adversely affect its ability to continue business.

Discussion

During the course of the hearings in these cases, the ties advised me that they proposed to settle the following kets:

T 84-5

ation No.	Date	30 CFR Section	Assessment	Settlement
5417	8/23/84	77.1605(b)	$46	$30

2076418	8/23/83	71.400	$20	$20

CENT 84-27

Citation No.	Date	30 CFR Section	Assessment	Settle
2077340	11/22/83	77.1710(d)	$147	$14

The parties presented arguments on the record in supp their proposed settlements. Citation No. 2076417, was iss after the inspector found that a scraper being used to spr topsoil for reclamation purposes had brakes which were not adequate enough to hold the machine on a five percent grad Petitioner's counsel stated that after further consultatio with the inspector who was present in the hearing room, pe tioner cannot support the "S&S" finding, and that the insp has modified the citation to delete this finding. In supp of this action, counsel asserted that the cited scraper wa operating in an area where no miners were on foot exposed any hazard, and that the brake condition was corrected wit an hour after it was discovered.

Citation No. 2076418, was issued when the inspector f that a waiver which the respondent had obtained concerning providing of bathing facilities, clothing change rooms, an flush toilets at its surface worksite, had expired. Petit counsel stated that upon further consultation with the ins it has now been confirmed that upon application by the res pursuant to the applicable procedures found in section 71. the waiver concerning the application of cited section 71. has been further extended until September 27, 1984, and th citation has been terminated. Counsel confirmed that MSHA in fact issued the waiver. Counsel also pointed out that surface mining facility in question is located approximate 10 miles out of town and is isolated from ready sources of

Respondent's counsel confirmed that the respondent ha provided "Porta-John" toilet facilities for the miners at site in question, and that the miners working at the facil are in agreement with, and do not oppose, the waiver which been granted for the facility. Counsel also stated that u the expiration of the current waiver, the respondent will for another extension.

presented by the parties in support of the proposed settlement of Citation Nos. 2076417 and 2076418, I concluded and found that the proposed settlements were reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 CFR 2700.30, the settlements were approved from the bench. My decision in this regard is hereby re-affirmed.

Citation No. 2077340, was issued after the inspector observed that two mechanics who were performing maintenance repair work on an end loader parked at the base of a highwal were not wearing hard hats or caps. Petitioner's counsel asserted that the parties proposed to settle this violation by the respondent agreeing to pay a reduced civil penalty in the amount of $74. Counsel stated that it was his understanding that the two mechanics had removed their hard hats in order to crawl under the loader to perform some repairs. Counsel also asserted that while MSHA's district manager is in agreement with the proposed settlement reduction, the inspector who issued the citation would not agree to modify and delete his "S&S" finding, and that he disagreed with the factual basis for the proposed settlement. Under the circumstances, the inspector was called as the Court's witness to testify as to circumstances which prompted him to issue the contested citation.

MSHA Inspector Lester Coleman confirmed that he issued the citation in question after observing that the two mechanics, who he identified by name, were not wearing hard hats or caps while performing maintenance on an end loader which had been parked at the base of the highwall in the active pit area. Mr. Coleman stated that the two mechanics had been dispatched to the area to perform some repair work needed to correct a condition which had been previously cited on the loader, and that their work was the work required to abate that particular violation.

Inspector Coleman testified that he observed no hard hats or caps in the area or on the loader, and that the two mechanics had in fact admitted to him that they had no hard hats or caps with them. Inspector Coleman confirmed that in order to abate the citation, one hard hat had to be obtained from the mine office, and that the respondent had to either go to town to purchard a second hard hat, or obtained one from one of its other mining operations in the area.

Inspector Coleman stated that while he observed no

Although respondent's counsel cross-examined Inspector Coleman, the respondent presented no testimony or evidence in defense of the citation or of the inspector's findings. Further, the respondent did not rebut Inspector Coleman's testimony regarding the absence of hard hats, and its defense is that the mechanics "were in a hurry" to complete their abatement work or another violation.

After full consideration of the testimony and arguments concerning this violation, the proposed civil penalty reductic and settlement was rejected from the bench. Respondent then proposed to pay the full amount of the initial civil penalty of $147, and that was approved. I hereby re-affirm these bench findings, and the citation IS AFFIRMED as issued, including the inspector's "S&S" finding.

CENT 84-44

This case concerns a section 104(d)(1) unwarrantable failure order issued by MSHA Inspector Lester Coleman, on January 24, 1984, with special "S&S" findings, charging the respondent with a violation of mandatory safety standard section 30 CFR 77.1605(b). The order, No. 2077410, describes the "condition or practice" cited by Inspector Coleman as follows:

> The 992 C caterpillar end loader operating in the 001 pit was not provided an adequate parking brake in that the one provided was inoperative and would not hold the machine against movement (rolling) on a small percentage grade (approx. 5%). There was (2) workmen on foot cleaning coal down grade in front of where the loader was working.

Procedural Rulings.

I take note of the fact that respondent's answer to the petition for assessment of civil penalty asserts that the Act does not require the mandatory assessment of civil penalties. In support of this contention, respondent asserted that while the citation concerned a "technical" violation of the Act, th law does not require that every violation, technical or other wise, be assessed a civil penalty.

Respondent's contention IS REJECTED. It seems clear to me, that upon a finding of a violation of a mandatory safet

t seems clear to me that any such challenge must be made within
hirty (30) days of the service of any order on an operator,
nd that since the petitioner here did not preserve his appeal
ights by filing an independent notice of contest on this issue
is precluded from raising it in this proceeding (Tr. 33-36).

Respondent's counsel stated that his intent was to challen
he special "S&S" findings made by the inspector in this case,
ell as the "special assessment" levied by MSHA's Office of
sessments for the alleged violation of section 77.1605(b) (Tr
8). The parties were informed that the matter of "S&S" may be
ursued in this case, but that the "unwarrantable failure"
inding and the validity of the order per se is not an issue, a
ounsel for the parties agreed with my ruling in this regard (T
6, 40). The parties were also informed that I am not bound by
ny "special assessment" made by MSHA, and that the Secretary's
rt 100 regulations concerning initial civil penalty assessmen
re not binding on the presiding judge (Tr. 40-41).

SHA's Testimony and Evidence.

MSHA Inspector Lester Coleman testified as to his backgrou
nd experience, including ten years service as an MSHA inspecto
nd prior work in the mining industry as a mine foreman.
. Coleman described the mine in question as a surface coal
ning stripping operation employing approximately 40 to 50
ners working 12-hour shifts, four days a week.

Mr. Coleman confirmed that he issued the order in question
January 24, 1984, during the course of his inspection of the
ne. He stated that he observed the loader in question diggin
oal, and that two men on foot were working "downgrade from the
chine" cleaning coal pits with shovels. He also observed
other end loader which was "working in conjunction" with the
ited machine, and that the second loader would be at different
ocations in the course of doing its work (Tr. 47). The
espondent stipulated that the cited loader in question weighed
pproximately 188,000 pounds (Tr. 49).

Mr. Coleman stated that while he personally did not test
e parking brake in question, the machine operator informed
im that it did not work. When Mr. Coleman asked the operator
o demonstrate the brake, the operator set the brakes and raise
he machine bucket, and the machine rolled (Tr. 47). When aske
hy he believed the failure to have an adequate parking brake
n the machine posed a hazard, Mr. Coleman replied as f l ys

the other machine and not contact it but cause the guy to run around it and run over one of the other guys or something.

On cross-examination, Mr. Coleman confirmed that the regular brakes used to control and stop the end loader in question when it was operating in forward and in reverse were operable, and that as long as the operator was in the machine he saw no problem and did not believe that there any hazard or likelihood of an accident. His only concer over the fact that if the machine were left unattended, t adequate parking brake would present a hazard.

Mr. Coleman stated that while he never observed the lar cited machine left unattended he has observed other ec unattended when the operator parks it in the pit area and goes for a drink of water or to the bathroom (Tr. 55). H he conceded that when an operator leaves his machine in t circumstances, he will stop it, set the brakes, and then the bucket to the ground. The bucket is dropped in order comply with mandatory safety standard section 77.1607(p) requires that all machine movable parts be secured or lo the ground when the machine is not in use (Tr. 55). If machine were parked with the bucket facing downhill, the would stop. However, he believed that the area where the loader was stripping coal had a rock bottom, and that the stripped grade was from one to three percent and it was for the machine to slide across the hard surface (Tr. 56

Mr. Coleman stated that when he first arrived at the area the loader in question was located somewhere else. foreman sent someone to bring the loader to the pit area informing him of the parking brake condition, and when i brought to the pit, the brake was checked (Tr. 57). Mr. conceded that the area where the machine was operating w than a 5% grade, and that while it was "flat," he conced "it wasn't very much of a grade" (Tr. 58). He also conc that the machine operators were "usually pretty good" ab lowering the bucket to the ground when their machines ar parked (Tr. 58). He stated that he has never observed a situation where a machine operator has alighted from his without lowering his bucket or ripper down (Tr. 62).

Mr. Coleman indicated that during any working day t are three or four times when a machine operator normally occasion to use his parking brake. One is in the mornin

however, since the mine has different grades, and since a foreman may stop a machine operator on a grade to speak with him, he was concerned about the inadequate brake (Tr. 61).

Mr. Coleman confirmed that he has inspected the mine on four or five previous occasions, and that he has never issued any citations for violations of section 77.1607(p) (Tr. 63). He also confirmed that he never observed the two coal cleaners around or near the machine while it was being parked, and he conceded that his belief that a fatality would occur stemmed from his assumption that the machine operator might decide to get off the machine while it is parked on a grade with the bucket up (Tr. 64).

Mr. Coleman stated that the foreman told him that he knew about the parking brake condition on January 23, and that to his knowledge the foreman had not ordered the parts to make the repairs. Mr. Coleman confirmed that the brake was repaired the next day (Tr. 66).

Mr. Coleman stated that the area where the loader was cleaning coal was approximately 150 feet square, and that it was operating in a seam approximately 16 to 18 inches thick. The two men in question were working away from the seam, and he conceded that if the machine happened to roll with its bucket up in the air, it should catch on the 18 inch seam before reaching the area where the men were working. However since there was a ramp along the edge of the coal seam, he believed that the machine could go up the ramp. Even so, he conceded that it would roll back and away from the two men (T

In response to questions from the bench, Mr. Coleman indicated that the loader in question was parked in another area of the mine. However, the foreman wanted to use it to break up the coal in the pit and he sent a workman to bring the machine to the pit (Tr. 70). Once it was driven to the pit area, Mr. Coleman decided to inspect it because an employ had informed him that the parking brake did not work and that is why the machine was parked. Upon checking the machine and finding the parking brake inadequate, Mr. Coleman cited it and had it taken out of service immediately (Tr. 71). He further explained as follows (Tr. 71-72):

> Q. So it actually was not doing any loading at the time you observed it?
>
> A. No, he was going to use it to break out

wouldn't be put in service, is that the idea?

A. Yes.

Q. So you didn't just happen to walk in this pit area and see this loader out there breaking coal and the two guys over there shoveling and then have it tested and then take it out of service?

A. No, I didn't.

Q. So you acted based on what somebody else told you, and when the loader was brought over there you tested it and found the parking brakes were inoperative and you wanted it taken out of service?

A. Yes.

Q. So it actually never began breaking and doing all the things that Mr. Petrick suggested it was doing while you were there; is that right?

A. That's correct.

Mr. Coleman stated that when the loader parking b tested the bucket was in a raised position, and that t was never tested with the bucket lowered. Had he test with the bucket down, and found that the machine would roll, he would still have issued the violation because law that I cited him under requires that he has a park brake" (Tr. 73). When asked whether he would also hav an "S&S" finding had the machine not rolled with the b down, he replied "yes," and he explained as follows (T 73-74):

A. Because of the importance of the thing. And the machine is there parked on several different grades. And, granted, usually it's more level th you know, it's two, three, five percent or someth like that. And the law requires that they have i and that the -- to me the significant reason, a l of times they get out and they will park the mach with it still running. A machine that big vibrat and it would start to roll.

happen that would cause the loader to get away and if it did it could likely strike somebody and if it did that it would likely kill them; is that it in a nutshell?

A. Or another machine, haulage trucks. They have haulage trucks that haul in the area, too.

Q. So you were trying to cover all bets, more or less?

A. Yes.

Q. Is that your understanding on how you go about making an S and S, significant and substantial finding?

A. Well, if it was significant or substantially contribute to or cause an accident or something, that's kind of the way I looked at it.

Findings and Conclusions

:t of Violation

Respondent is charged with a violation of section 77.1605(b) having an inadequate parking brake on a rubber-tired loader. Respondent presented no witnesses in defense the citation, and simply relied on the cross-examination Inspector Coleman to establish that the violation was not gnificant and substantial.

Mandatory safety standard section 77.1605(b), requires at mobile equipment be equipped with adequate brakes, and at all front-end loaders also be equipped with parking akes. Although the standard does not specifically require at such parking brakes be adequate, I read this into the guage of the standard as a logical requirement. Here, once e parking brakes was tested, it was found to be inadequate ce it did not prevent the end loader from rolling. The spondent has not rebutted MSHA's prima facie case of a olation of section 77.1605(b), and the violation IS AFFIRMED.

area, he observed the end loader in question digging coal and operating in the proximity of two men who were working "downgrade" cleaning coal. Given the inspector's asserted concern that if left unattended, with the engine running, the machine could have rolled and struck the two men, my first inclination was to find that the violation was signifi and substantial. However, for the reasons which follow, I cannot conclude that this is the case.

On cross-examination, and in response to further bench questions, the inspector admitted that when he first arrived at the pit area, the end loader was in fact parked in anothe area, and was not in operation or breaking or loading coal. He indicated that someone had informed him that the machine had an inadequate parking brake, and when it was brought to the pit, the inspector had the brake tested, and after finding that it would not hold the machine, he ordered the machine taken out of service until the parking brake could be repaired the next day. In short, the machine was never used, and the petitioner has not established otherwise.

The testimony and evidence in this case establishes that the pit area where the end loader in question would normally be operating was flat, and with very little grade. Further, the inspector conceded that during prior inspectior of the mine site he never observed the machine left unattend and in fact he conceded that in his experience, when an operator has to leave the machine to go to the bathroom or take lunch, the machine is always stopped, the front buck is lowered to the ground, and the operational brakes are set He also conceded that he has never cited the respondent for a violation of mandatory standard 77.1607(p), which requires that machine buckets be lowered to the ground when not in use, and petitioner advanced no evidence to show that the respondent has ever been cited for such infractions.

The inspector confirmed that the regular brakes used to stop the end loader when it operated forward and in rever were adequate and operational, and no hazard was presented while the machine was in operation. Although the inspector stated on the face of the violation notice which he issued that the inadequate parking brake would not hold the machine against movement on a grade of "approximately 5%," he conced during his testimony that it was less than 5%.

owngrade" were in fact out of the pit area. The inspector so conceded that in the event the machine had rolled, it uld have come to rest at the edge of the pit, and absent y credible showing that a 188,000 machine can jump up and t of the pit, I cannot conclude that this was reasonably kely to happen. Although the inspector indicated that there s a ramp constructed in the pit to facilitate the machine ving in and out, his "theory" that the machine could have lled up the ramp, out of the pit, and then rolled down d struck the two men is rejected. There is absolutely credible facts to establish that this was reasonably ely to occur.

The inspector conceded that when he tested the parking ake, he did so with the bucket up, and not down as it is rmally left when the operator leaves the machine. Further, ere is no evidence that the inspector ever observed the chine parked in the pit, and he confirmed that he never observed yone around the machine while parked. Since the parties iled to call the two men in question to testify, I have basis for determining where they were positioned in lation to the machine, or where they would normally be sitioned once the loader was in operation. These are critical ts to any determination as to the likelihood of an accident.

Based on all of the evidence and testimony here presented seems clear to me that the inspector made his "S&S" finding an assumption that when and if the machine were placed service, the operator would park the machine with the ket up, in violation of section 77.1607(p), and that he ld not follow the normal operational procedures for securing e machine when it is left unattended. Given the fact t the inspector conceded that to his knowledge, end-loader erators always follow those procedures, and given the fact at the inspector offered no credible evidence to the contrary, s assumptions are simply unsupportable. I am convinced at the inspector made his "S&S" finding in order to cover ery conceivable set or circumstances which may have triggered accident once the machine was placed in service. Such theory of "S&S" would require an inspector to find any olation to be "S&S."

In my view, the only fact presented by the petitioner conceivably support an "S&S" finding in this case is testimony that the pit foreman admitted that he knew the

also advised him that this reason why the machine had been parked in an area away from the pit where it would normally be operating.

The respondent failed to call the pit foreman to rebut the inspector's testimony, and also failed to rebut the inspect testimony during cross-examination. By the same token, the petitioner failed to subpoena the pit foreman, and since the inspector marked the "negligence" portion of his citation to indicate a "reckless disregard" of the requirements of the cited standard, I can only speculate that he did so on the basis of the pit foreman's purported admission. Even so, based on all of the circumstances discussed above, including the fact that the inspector immediately took the loader out of service before it was operated in the pit, the totality of the circumstances presented do not establish that an accident was reasonably likely to occur. Even if the machine were placed in service with an inadequate parking brake, I am of the view that the possibility of an accident was remote and not reasonably likely to occur. Accordingly, the inspector's "S&S" finding IS VACATED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of a reasonable penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my finding and conclusions on these issues.

History of Prior Violations

Exhibit G-1 is a copy of a computer print-out summarizing the number of violations assessed and paid by the respondent for the period November 1, 1981, to October 31, 1983, for the Heavner No. 1 Mine. That information reflects a total of eleven paid violations, three of which are for prior violations of section 77.1605(b). However, since the petitione did not submit copies of these prior section 104(a) citations, I have no way of knowing whether or not they were issued for end loaders. However, I do note that two of the citations were issued in November 1982, and are "single penalty" assessments for $20 each, and the other one was issued in June 1983, and was assessed at $50.

cordingly, I find that the violation was promptly abated in od faith by the respondent.

gligence

The inspector's unrebutted testimony in this case ongly suggests that the foreman or pit superintendent, d prior knowledge of the inadequate parking brake, but etheless had the machine brought to the pit area in that dition, fully intending to use it. The inspector's testimony as follows:

> A. No, sir, the machine was in another area when I arrived, and the foreman, Superintendent Jim Payne sent another workman to get the loader. And he didn't inform this guy about the condition, so the guy went to another area and brought the loader into this pit area. And when he was bringing it down we checked it (Tr. 57).

And, at Tr. 76-77:

> Q. Okay. Was Mr. Payne there when the machine was brought to the area?
>
> A. Yes.
>
> Q. He's the fellow that asked them to bring it?
>
> A. Yes.
>
> Q. Now, why would Mr. Payne do something like that if he knew that the parking brake was inoperative? Does that make sense, particularly with a federal inspector there. I don't know Mr. Payne, I assume he has got better sense than that, but maybe not, I don't know. Mr. Payne, if you're here, I apologize for that, sir, but I couldn't resist.
>
> A. I can't answer that.
>
> Q. I can't see the pit foreman -- is Mr. Payne a foreman of some kind?

piece of equipment had defective parking brakes and he tells the fellow to bring it over there and put it in operation.

A. Mr. Payne told me that he knew himself.

On the basis of the foregoing, I conclude and find that the violation here resulted from the respondent's failure to exercise the slightest degree of care to insure that the inadequate brake condition was attended to before bringing the cited machine to the pit area, fully intending to put it into operation. Although I have considered the possibility that the respondent had the machine parked because it intended to repair the inadequate parking brake, absent any mitigating testimony by the respondent, I can only conclude that had the inspector not removed the machine from service, Mr. Payne would have allowed it to be put in service with the inadequate brake condition. Under the circumstances, I conclude and find that the violation resulted from gross negligence on the part of the respondent, and this is reflected in the civil penalty assessed by me for the violation.

Gravity

Although I have concluded that the violation here is not significant and substantial, I cannot conclude that it was nonserious. While it is true that there was no reasonable likelihood that an accident would occur, it seems to me that given the fact that Mr. Payne apparently knew about the condit and was willing to take a chance and put the machine with an inadequate parking brake, there was a possibility, albeit unlikely, that an accident could occur. Accordingly, I conclude and find that the violation was serious.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil panalty in the amount of $300 is appropriate for the cited violation.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $300 for a violation of mandatory standard

is proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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SEP 12 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 82-1 A.C. No. 29-00096-03011
v.	:	Docket No. CENT 82-2 A.C. No. 29-00096-03012
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	McKinley Strip Mine

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicito
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
John A. Bachmann, Esq., The Gulf Companies,
Denver, Colorado,
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal M Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose as a result of an inspection of respondent's co mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability under the Act.

After notice to the parties, a hearing on the merits was held in Gallup, New Mexico on October 19, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the regulatic if so, what penalties are appropriate.

eral Regulations, Section 77.1302 J, which provides as
lows:

> § 77.1302 Vehicles used to transport explosives.
> (j) When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicles shall be blocked securely against rolling.

MSHA's evidence shows that on July 7, 1981 Federal Inspecto
rence Rivera issued this citation when he observed a parked
ck; it lacked chocks to prevent it from rolling. The truck,
ch carried explosives, was located in the pit area (Transcript
pages 12, 13; Exhibit P3). The truck would have to be moved
t day (Tr. 14-15).

Two miners were affected by this hazard which could cause a
ality. The possibility of an accident was remote as the truck
parked in a small dip in a coal seam (Tr. 13, 14, 52-53).
cks were brought in and placed to secure the vehicle (Tr. 15).

Discussion

The facts establish a violation of the regulation.
pondent's witness Gary D. Cope agreed that the vehicle did not
e chocks (Tr. 136, 137).

The evidence shows the truck was parked in a dip. Accord-
y, it was not likely to move in any event. The foregoing
dence relates to issues of gravity and negligence. These are
tors to be considered in assessing a civil penalty.

Citation 826734

This citation alleges respondent violated 30 C.F.R.
7.1110, a performance standard. It provides:

> § 77.1110 Examination and maintenance of firefighting equipment.
> Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

The condition was abated by installing usable equip
19).

Respondent's witness Cope produced photographs of t
Chemical type fire extinguishers installed on the compan
pickup trucks (Tr. 104, 105; Exhibit D4). Respondent's
graphs also show the performance of the extinguisher. I
suitable for the use intended (Tr. 110-116; D4 thru D7).

The manufacturer's specifications do not provide a
this particular extinguisher. The hand operated unit di
flow of its contents through a short one inch nozzle at
discharge point.

Discussion

The cited regulation requires that firefighting equ
shall be maintained in a usable and operative condition.
extinguishers are equipped with a hose together with an
nozzle. However, even though these extinguishers were n
equipped, they are, nevertheless, in a usable and operat
Hence, respondent did not violate the regulation.

For these reasons this citation should be vacated.

Citation 826737

This citation alleges a violation of 30 C.F.R. § 77
cited in the previous citation.

The inspector issued this citation because the hose
nozzle were missing on the extinguisher. The equipment
truck number 121. The cited vehicle was different from
previously cited. Respondent abated the citation by ins
usable equipment (Tr. 20, 21; P5).

Respondent's evidence indicates that the same type
equipment existed as discussed in connection with the pr
citation (Tr. 104-105, 109, 113-114).

iscussed in connection with Citation 826734.

Citation 826741

This citation alleges a violation of 30 C.F.R. 77.1109(c)(1) which provides:

> (c)(1) Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and auger shall be equipped with at least one portable fire extinguisher.

Inspector Rivera issued this citation when he observed a orklift without a fire extinguisher (Tr. 22, 23; P6). The orklift was observed when it was approaching the shop. At th oint it was about 600 feet away from the shop (Tr. 23-24; P10

One or two miners were affected by the hazard arising fro he lack of a fire extinguisher (Tr. 25-26). An extinguisher stalled to abate this condition (Tr. 26-27).

Respondent's evidence indicates its forklift remains in t rea of a single structure which consists of the shop, warehou nd office building (Tr. 139). The forklift normally will go eet to the open air storage. Then it will travel about 50 fe o the fuel dock. In addition, it will encompass 100 feet to ther end of the oil dock (Tr. 139). These areas all have refighting equipment (Tr. 139, 140).

Discussion

Respondent considers the forklifts are used in connection ith warehouse and open air storage. Therefore, they constitu uxiliary equipment" (Tr. 103, 104). Section 77.1109(c)(3) efers to auxiliary equipment in the following terms:

> (3) Auxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher.

A single credibility issue arises in connection with this itation. Inspector Rivera indicated that he observed the orklift when it was about 600 feet from the shop (Tr. 23-24),

I credit respondent's evidence. Witness Cope would be mor familiar with the area where the forklift operates. In additio it is apparent from his testimony that Inspector Rivera was unsure of the location of the forklift in relation to the shop area when he observed it (Tr. 23, 24).

The principal issue then evolves into whether a forklift i "mobile" or "auxiliary" equipment. If the latter no fire ex- tinguisher is required.

I conclude that a forklift constitutes mobile equipment. This conclusion rests on several facts. First of all, a forkli is "capable of moving" and it thus meets the definition of bei "mobile", Webster's New Collegiate Dictionary, 732, (1979). In addition, Section 77.1109(c)(1) describes certain types of mobi equipment whereas Section 77.1109(c)(3) describes certain types of auxiliary equipment. I find that a forklift is more akin to the equipment the standard describes as "mobile" than to the equipment described as "auxiliary".

The citation should be affirmed.

Citation 826744

This citation alleges a violation of 30 C.F.R. § 77.604 which provides:

> § 77.604 Protection of trailing cables.
>
> Trailing cables shall be adequately protected to prevent damage by mobile equipment.

Inspector Rivera wrote this citation when he recognized eight tire marks (crossing and returning), on a 23,900 volt cai (Tr. 28; P7). The cable, in an obvious location alongside the roadway, supplied power to a dragline (Tr. 28, 29).

A rupture of the cable could shock a person. In addition an explosion could occur. Severe burns, electrical shock and possibly a fatality could result from this condition (Tr. 28-3 The condition was abated when the miners were instructed to av the cable (Tr. 31).

Respondent's witness agreed there were eight tire marks o the cable (Tr. 122). The top soil had not been removed; the s

The company did not know who had run over these cables. the past, the company has disciplined two or three employees f driving over its cables (Tr. 134-135).

Discussion

This regulation requires that trailing cables shall be ad quately protected to prevent damage. In the instant case it i unrefuted that the cable was lying on the ground and it had be run over by mobile equipment (Tr. 75). Adequate protection wo include barricading the area, burying the cables or suspending the cables overhead (Tr. 87).

In his closing argument respondent's counsel relies on C.F.&.I. Steel Corporation, 3 FMSHRC 2168, (1981). In the cit case Judge John A. Carlson vacated a citation involving an alleged violation of the same standard. Judge Carlson ruled i his case that he was more persuaded by respondent's inferences than those urged by the government, 3 FMSHRC at 2169.

The case relied on by respondent is not controlling. On contrary, in this case, I am persuaded by Inspector Rivera's testimony. An explosion could be caused by the sharp material under the surface of the cable. It had obviously been run ove by a vehicle (Tr. 28-29). In addition, Inspector Rivera has a considerable background as an MSHA coal mine inspector. This experience causes me to accept his opinion of the hazard invol (Tr. 7, 8; P2).

The citation should be affirmed.

Citation 826745

This citation alleges a violation of 30 C.F.R. § 77.204 which provides:

> § 77.204 Openings in surface installations; safeguards Openings in surface installations through which men or material may fall shall be protected by railings, barriers, or covers or other protective devices.

Inspector Rivera issued Citation 826745 because the opera failed to provide a railing at the opening of a loading dock.

One worker was affected by this hazard (Tr. 37).

The condition was abated when a broken hook was replaced welding it at one side (Tr. 38). The operator of the forklift requested some type of protection here for this condition (Tr. 67).

In Inspector Rivera's opinion the opening here is in a ertical surface. It is similar to a door opening (Tr. 69-70)

Discussion

In support of its motion to dismiss respondent relies on State ex. rel. City Iron Works v. Ind. Com., 368 N.E. 2d 291, (1977).

In the cited case a worker fell from the edge of a roof. The Appellate Court decision construes three sections of the Code of Specific Safety. The requirements of the Ohio Code a considerably narrower than the scope of 30 C.F.R. Section 77. Accordingly, City Iron Works is not controlling.

In this case the Secretary's regulation, 30 C.F.R. § 77.2 defines the scope of surface installations. It requires an perator to maintain all mine structures, enclosures or other facilities in good repair to prevent accidents and injuries. general description of a surface installation in Section 77.20 is sufficiently broad to include respondent's loading dock. he facts here it is established that miners could fall from dock if a protective chain was not used to provide a warning revent a fall. In addition, a chain had been furnished acros this opening before this citation was issued. Inspector River bserved that a hook on one side had broken off. The conditi was abated by rewelding the hook (Tr. 35, 38).

The citation should be affirmed.

CENT 82-2
Citation 826746

This citation alleges a violation of 30 C.F.R. § 77.604, lating to protecting trailing cables, cited, supra.

Inspector Rivera wrote this citation when he saw tire ma from where a pickup had run over a cable. The pickup, adjace

The cable, carrying 23,900 volts, involves an electrical shock hazard (Tr. 41). Men in the pickup as well as men movi the cable would be affected by such a hazard (Tr. 41).

The condition was obvious because it was adjacent to the road. The hazard was abated by installing a berm between the road and the cable (Tr. 43). According to the inspector, the mine superintendent knew the condition existed (Tr. 44-45).

. Discussion

The uncontroverted facts establish a violation of the regulation. The citation should be affirmed.

CIVIL PENALTIES

The six criteria for assessing a civil penalty are set f in 30 U.S.C. § 820(i).

In considering the statutory criteria I find that the operator has a minimal adverse history. Five violations were assessed between August 8, 1979 and January 10, 1980 (Exhibit The penalties, as proposed, are appropriate in relation to th large size of the operator (Tr. 9). In those citations where find a violation I also find that the operator was negligent because the violative conditions were open and obvious. As previously discussed the gravity and negligence concerning Citation 826733 are overstated and the penalty should be redu The gravity of the remaining citations is apparent on the fac In favor of the operator is its good faith in rapidly abating defective conditions.

On balance, I deem the following penalties to be appropriate:

CENT 82-1

Citation	Proposed Assessment	Disposition
826733	$170	$ 85
826734	66	Vacate
826737	72	Vacate
826741	84	84
826744	180	180

Citation	Assessment	Disposition
826746	$78	$78

Based on the foregoing findings of fact and conclusio law I enter the following:

ORDER

In CENT 82-1

1. The following citations are affirmed and a civil is assessed as indicated:

Citation	Penalty
826733	$ 85.00
826741	84.00
826744	180.00
826745	122.00

In CENT 82-2

826746	$ 78.00

2. The following citations and all penalties therefo vacated.

In CENT 82-1

Citation 826734
Citation 826737

John J. Morris
Administrative Law Judge

Distribution:

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SEP 12 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 84-151 A. C. No. 15-13881-03520
v.	:	Pyro No. 9 Slope William Station
PYRO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on August 30, 1984, a motion for approval of settlement in the above-entitle proceeding. Under the parties' settlement agreement, respondent would pay a reduced penalty of $450 for a single alleged violation of 30 C.F.R. § 75.200 in lieu of the penalty of $800 proposed by MSHA.

The alleged violation here at issue is one which could not be disposed of in my decision issued July 26, 1984, in this proceeding because it was not a part of the record resulting from the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R which was the basis for the decision issued on July 26 1984. Although the Commission issued a "Direction for Review" of that decision on August 24, 1984, the issues to be considered by the Commission do not pertain to the remaining issues in this proceeding which have been settled by the parties.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement discusses those criteria. The mine here involved produces about 1,600,000 tons of coal annually and respondent's production on a company-wide basis is approximately 3 million tons per year. Those figures support a finding that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are

January 1984. MSHA's proposed penalty of $800 is based on history of previous violations given in the proposed assess sheet. When 25 violations occurring during 125 inspection are evaluated under the provisions of MSHA's assessment fo in 30 C.F.R. § 100.3(c), the violations per inspection day so few that no part of the penalty proposed by MSHA could been assigned under the criterion of history of previous v tions. Since I am dealing with a motion to approve settle of MSHA's proposed penalty, it is appropriate for me to co the information given in the proposed assessment sheet, ra than the somewhat inconsistent figure of 40 previous viola given in the motion for approval of settlement.

Additionally, it should be noted that a single number previous violations is hardly suitable for evaluating a re ent's history of previous violations because it cannot be plied under section 100.3(c) of the assessment formula unl the number is also associated with the number of inspectio which occurred during the time that the violations were ac lated. In most cases which go to hearing, the Secretary's sel provides a computer printout which lists previous viol along with the dates on which they were cited. That kind formation enables a judge to determine whether the violati occurred many months prior to the violation under consider or immediately prior to the violation under consideration. lations of the same standard occurring immediately prior t violation under consideration show that respondent's histo not favorable, whereas violations which have occurred a ye more prior to the violation under consideration show a tre toward an improvement in safety. Unless a judge has the k information described above, it is difficult to evaluate t criterion of history of previous violations. As indicated however, I am relying upon the information given in the pr assessment sheet in this proceeding and that shows that no of MSHA's proposed penalty was assigned under the criterio history of previous violations.

The motion for approval of settlement states that res ent abated the violation within the time provided and MSHA narrative findings indicate that the violation was abated in a reasonable period of time", but neither the motion fo proval of settlement nor MSHA's narrative findings indicat whether any portion of the penalty was assigned under the terion of the operator's good-faith effort to achieve rapi pliance. My practice has always been to increase a penalt if there is information available to show that respondent

find that it was appropriate for no portion of the penalty to b assigned under the criterion of good-faith abatement.

The motion for approval of settlement states that payment of the penalty will not have an adverse effect on the ability o respondent to continue in business. Therefore, MSHA appropriately did not reduce the penalty under the criterion that payment of large penalties would cause respondent to discontinue i business.

Consideration of the remaining two criteria of negligence and gravity requires a brief discussion of the nature of the alleged violation. The inspector alleged that a violation of section 75.200 had occurred because respondent had failed to install 6 timbers at each crosscut along the supply entry to within 240 feet of the tailpiece of the conveyor belt, as required by the roof-control plan. Out of 11 crosscuts, four had the timbers set, four of them had timbers set on one side, and three did not have timbers set at all. The motion for approval of settlement agrees that the inspector properly considered the violation to have been associated with a high degree of negligence so that no reduction in the penalty should be made under the criterion of negligence.

Since the parties have not based a reduction of MSHA's proposed penalty on any of the five criteria discussed above, it is obvious that all of the reduction has to be made under the criterion of gravity. The motion for approval of settlement bases the reduced penalty primarily on the fact that the inspector had evaluated the criterion of gravity by checking item 21C on his citation to show that nine persons could have been expected to be exposed to injury if a roof fall had occurred. The motion states that all of the crosscuts at issue were a long distance from the face area and that it would be highly unlikely that a roof fall in the supply entry would affect all nine persons working on the section which was served by the supply entry.

The fact that less than nine persons would be affected by a roof fall, if one had occurred, is a reason to reduce the per alty, but some additional discussion may be helpful in showing why the parties' settlement agreement should be granted. It should be noted that MSHA's proposed penalty of $800 is based on narrative findings which state that the inspector's evaluation of the alleged violation has been considered. The narrative findings do not indicate, however, how much of the penalty

occurred in the supply entry.

On the other hand, the narrative findings do state t six timbers were required to be set at crosscuts to withi feet of the face, whereas the inspector's citation stated they had to be set within 240 feet of the tailpiece of th veyor belt. Therefore, the person who prepared the narra findings may have considered the violation to be more ser than it really was because he or she may have been evalua lack of timbers as a matter which was a rather constant t during actual production operations, rather than a danger would only have affected a person traveling in the supply at a considerable distance from the working section.

Any time that penalties are determined on the basis jective judgments, as occurred in this instance, it is di to say that a penalty should be precisely $800 as propose MSHA or $450 as agreed upon by the parties for purpose of ment. I believe that the discussion above shows that a p of $450 is reasonable in this instance and I find that th ties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is grante the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Mining Company, within 30 days from the date of this deci shall pay a civil penalty of $450 for the violation of se 75.200 alleged in Citation No. 2074793 dated January 14,

Richard C. Steff
Richard C. Steffey
Administrative Law Jud

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. D of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashv 37203 (Certified Mail)

William M. Craft, Assistant Director of Safety, Pyro Min

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 82-58-M A.C. No. 45-02582-05002
v.	:	Pole Road Pit No. 1 Mine
FERNDALE READY MIX & GRAVEL, INC., Respondent	:	

DECISION

Appearances: Ernest Scott, Jr., Esq., Office of the Solicito
U.S. Department of Labor, Seattle, Washington,
for Petitioner;
Mr. William A. VanWerven, President, Ferndale R
Mix & Gravel, Inc., Ferndale, Washington,
appearing Pro Se.

Before: Judge Morris

This case, heard under the provisions of the Federal Min
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the
"Act"), arose from an inspection of respondent's surface sand
gravel operation. The Secretary of Labor seeks to impose civ
penalties because respondent allegedly violated various safet
regulations promulgated under the Act.

After notice to the parties, a hearing on the merits was
held in Bellingham, Washington on January 9, 1984.

The parties did not file post trial briefs.

Issues

The threshold issue is whether a Congressional funding resolution prevents MSHA from proceeding with this case.

The secondary issues are whether respondent violated the various regulations; if so, what penalties are appropriate.

Stipulation

2. Respondent was the owner and operator of Pole Roac No. 1 Mine, at all times material to this case.

3. Respondent's business affects commerce, and the M: Safety and Health Review Commission has jurisdiction to hea case.

4. Respondent admits paragraph III, of the petition i in WEST 82-58-M.

5. As a result of an inspection of the Pole Road Pit Mine, Everson, Washington, by Federal Mine Safety and Healt Inspector James Broome on July 28, 1981, Citations Nos. 58 588682, 588683, 588715, 588716, 588717, 588718, 588719, an 588720, were issued to Respondent.

6. Copies of the aforesaid citations are contained i Exhibit "A" to the Petition for Assessment of Penalty file this case by petitioner, and may be admitted into evidence the sole purpose of showing they were issued.

7. Orders of Withdrawal Nos. 587071, 587058, 587059, 587060, 587141, 587142, 587143, 587144, and 587145, copies which are contained in Exhibit "A" to the petition for ass of penalty filed in this case, were issued to respondent o September 2, 1981, by Federal Mine Safety and Health Inspe David Estrada.

8. Copies of the aforesaid Orders of Withdrawal may b admitted into evidence for the sole purpose of showing the issued.

9. As of the date (September 2, 1981) Inspector Davi Estrada issued the aforesaid Orders of Withdrawal, respond not yet corrected the conditions identified in the citatio referred to in numbered paragraph No. 5 above.

10. Respondent corrected the conditions referred to i numbered paragraph No. 5, herein above and came into compl with the Federal Mine Safety and Health Act of 1977, and applicable regulations on or about September 10, 1981.

11. During the two year period ending July 28, 1981, respondent did not have any history of violations under th

14. The Pole Road Pit No. 2 mine produced 9-10 thousand t
of wash materials during 1981.

15. Respondent's annual dollar volume of business done o
sales made during 1980, 1981, and 1982 are set forth below:

1980 - $60,000
1981 - $40,000
1982 - $50,000

16. Respondent had approximately the following number of
production employees during the following years:

1980 - One part time
1981 - One part time
1982 - One part time

17. At the commencement of the hearing it was further
stipulated that Mr. VanWerven and his son do not contest the
factual allegations contained in the nine citations issued by
James Broome (Transcript at pages 5 and 6).

MSHA's fiscal authority

A threshold issue concerns MSHA's authority to expend fu
in this case. The evidence on this issue is uncontroverted.

MSHA inspected this sand and gravel operation and issued
citations on July 28, 1981. Orders of withdrawal were issued
September 2, 1981. On December 18, 1981 respondent filed its
notice of contest.

On December 15, 1981 President Reagan signed H.R.J. Res.
370, Pub. L. No. 91-92, § 131, 95 Stat. 1183, 1199 (1981). Th
foregoing Congressional funding resolution prohibits MSHA fro
enforcing the Mine Safety Act provisions with respect to vari
operations including sand or gravel activities (Exhibit J-1).

On January 4, 1982 MSHA wrote to respondent and indicated
that the foregoing funding resolution restricted the agency f
enforcing the Act. MSHA's letter further indicated that

taken at this time (Exhibit R-1).

The above prohibition which arose from the funding resolu did not continue in effect. Jurisdiction over sand and grave was returned to MSHA when President Reagan signed the fiscal supplemental appropriations bill on July 18, 1982 (Exhibit J-

On this record it does not appear that MSHA expended any funds on this case during the time the funding prohibition wa effect. Once jurisdiction was returned to MSHA, in July 1982 the agency could legally proceed with the prosecution of this action. The case was not presented until January 1984, long after the funding prohibition had been dissolved.

On a related case deciding jurisdiction in relation to t same Congressional funding resolution see the Commission deci of Secretary on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516, 525 (1984).

MSHA is not in violation of the funding resolution, accordingly, the agency complied with the law in presenting i evidence in this case.

Citation 588681

This citation proposes a civil penalty of $34. Responde does not contest the factual allegations in the citation. Th allegations are, in part, as follows:

> The elevated walkway around the wash screen was not kept clear of rocks and dirt on the drive side of the screen. The buildup presented a tripping hazard to person walking on the walkway.
> (Exhibit E-1).

The citation allegedly violated is contained in Title 30 Code of Federal Regulations, Section 56.11-2, which provides follows:

> 56.11-2 Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

MSHA Inspector James B. Broome indicated that he ins ect

fatality (Tr. 11, 12; Exhibit E10). The inspector concluded t
management was not aware of this condition (Tr. 10-11).

Respondent presented no evidence concerning this citation

Discussion

The Commission previously affirmed a violation of this regulation in a factual setting where there were tools, hooks, wire rope and rocks lying near the edge of the elevated walkwa In addition, there was no toeboards around the edge of the platform to prevent the loose material from falling over the e and striking employees below. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39. The writer is bound by the above Commission precedent.

For these reasons Citation 588681 should be affirmed.

Citation 588682

This citation proposes a penalty of $72 and it reads, in part:

> The V-belt drive for the lead pulley of the wash scree feed conveyor was not guarded. It was about 5 1/2 feet above the level of its wash screen walkway and readily accessible to a person on the walkway. (Exhibit E-2).

The citation allegedly violated, 30 C.F.R. 56.14-1, provides:

> Guards
>
> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarde

plain sight. It should have been known to respondent. I addition, the inspector had previously advised the compar it was not in compliance concerning the V-belt. No citat been previously issued for this condition because the pla not then operating (Tr. 12-14).

The same wash screen appears in this citation as in previous citation (Tr. 13-14). The V-belt drive is 5 1/2 from the walkway; the pulley itself is directly in the ce the walkway (Tr. 15; Exhibit E-11).

This condition could cause injuries ranging from bru fingers to the loss of a hand (Tr. 14-15).

Respondent's witness Larry William VanWerven testifi inspectors on previous occasions had not required guards conditions cited here (Tr. 35-38).

Discussion

The facts establish a violation of Section 56.14-1. facts of the case see the Commission decision of Missouri Company, 3 FMSHRC 2470 (1981).

Respondent's defense is generally asserted as to all guarding citations. It is in the nature of a collateral against MSHA because the inspectors did not previously is citations for these same violative conditions.

The fact that citations were not previously issued f violations of the guarding standard does not invoke the d of collateral estoppel. The inspectors have different ar expertise and it may well be that for some particular rea violative condition is (or is not) brought to an inspecto attention. The doctrine cannot be invoked here to deny m the protection of the Mine Safety Act. I have previously to apply the doctrine in similar circumstances. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minera Company, WEST 82-155-M (August 1984); see also the Commis decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (

Respondent generally raised this issue and this ruli applies to Citation 588716, 588717, 588718, infra.

The citation should be affirmed.

> The plant operator did not have a method of communication to summon help in case of an emergency. (Exhibit E-3).

The citation alleges respondent violated 30 C.F.R. 56.18- which provides:

> 56.18-13 Mandatory. A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

In addition to the factual allegations in the citation, Inspector Broome testified there was no means to summon help i worker was injured. But no employee was exposed to this hazar since this was a one man operation (Tr. 16-17).

Larry VanWerven testified that there was a private busine located about 750 feet from the walkway. The business was ope six days a week from 9 a.m. to 5 p.m. (Tr. 34, 35).

Discussion

The facts establish a violation of the regulation. The availability of a business telephone 750 feet from the walkwa not a "suitable" communication system. It is both too remote under the control of another.

Citation 588715

This citation proposes a penalty of $195 and it reads, ir part:

> The 966 Cat front end loader, which was feeding the plant and loading customer trucks did not have the automatic backup warning alarm in working order. The large muffler prevented the operator from having a clear view to the rear. (Exhibit E-4)

The citation alleges respondent violated 30 C.F.R. 56.9-2 The correct standard would be 30 C.F.R. 56.9-87. Inasmuch as espondent does not dispute the factual allegations in the citation, pursuant to the Federal Rules of Civil Procedure, th

30 C.F.R. 56.9-87 provides as follows:

> 56.9-87 Mandatory. Heavy duty mobile equipment shal be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automat reverse signal alarm which is audible above the surrounding noise level or an observer to signal when i is safe to back up.

Witness Broome observed that at the time of his inspect only one worker was present. Hence, there was no exposure t employees. But customers who were loading at the time were exposed to this hazard (Tr. 16-18).

Mr. VanWerven told the inspector that he didn't know th truck lacked a backup alarm (Tr. 18).

Respondent offered no evidence in connection with this violation.

The facts establish a violation. The citation should b affirmed since the lack of knowledge of this defect does not constitute a defense.

Citation 588716

This citation proposes a penalty of $60 and it reads, i part:

> The tail pulley of the pea gravel conveyor did not h a guard to prevent someone from getting caught in th moving machinery.
>
> (Exhibit E-5)

The standard allegedly violated regarding guards, 30 C. 56.14-1, is set forth, supra.

The MSHA inspector testified that he had informally adv Mr. VanWerven 2 to 6 months before the inspection that the conveyor, which was in plain sight, needed a guard (Tr. 19).

The operator of the conveyor was the only worker expose (Tr. 19).

is without merit.

Citation 588717

This citation proposes a penalty of $60 and it reads, in rt:

> The tail pulley of the 7/8" rock conveyor did not have a guard over the pinch points to prevent a person from getting caught in the moving machinery.
> (Exhibit E-6)

The standard allegedly violated, 30 C.F.R. 56.14-1, is set rth, supra.

Inspector Broome indicated he had notified Mr. VanWerven out this condition. One worker was exposed to the violative ndition which could cause injuries ranging from fractured hand a fatality (Tr. 19-21).

This tail pulley, about knee high, was near a footing at th t end of the screen (Tr. 21).

Respondent's evidence generally indicated that other spectors failed to require guards (Tr. 35-36).

Discussion

The testimony and the photographs (Exhibit E-13) establish violation of the standard. Respondent's defense has been eviously discussed and found to be wanting.

The citation should be affirmed.

Citation 588718

This citation proposes a penalty of $60 and it reads, in rt:

> The tail pulley of the 1 1/2" rock conveyor did not have a guard to prevent someone from getting caught in the pinch points of the moving machinery.
> (Exhibit E-7)

The standard allegedly violated, relating to guards, 30 .R. § 56.14-1, is set forth supra.

number of times it would be necessary to shovel out the debr
the tail pulley.

The same type of an accident could occur as with other unguarded tail pulleys. An accident could range from a brui hand to the loss of an arm to a fatality (Tr. 23).

The tail pulley was in plain sight. In addition, the inspector had informally advised the company about this cond (Tr. 22-23).

Discussion

The facts establish a violation of the standard. The sa ruling applies to the defense of collateral estoppel.

Citation 588719

This citation proposes a penalty of $44 and it reads, i part:

> The walkway around the wash screen had an opening on the sand screw end through which a man could fall or step into the worm of the sand screw.
> (Exhibit E-8)

The standard allegedly violated, 30 C.F.R. 56.11-12, provides:

> 56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The inspector saw one employee exposed to this condition Each time the employee walked around the walkway he had to st over the hole in the screen. The hole, about two feet by two feet was in plain sight (Tr. 24). A person could fall 2 1/2 feet if he fell through the hole (Tr. 25).

Discussion

The facts and the photograph (E-14) clearly establish a violation of the regulation. Respondent's defense has been p vi sly discussed. It is again denied.

(Exhibit E-1)

The standard allegedly violated, 30 C.F.R. 56.11-2, was cited in connection with the first citation in this decision

The inspector testified that a 42 inch handrail encompa the walkway; except there was no handrail for 8 to 10 feet a the walkway. In addition, a chain was not hooked to block o access at the end of the walkway (Tr. 26, 27).

One worker was exposed to this condition. If he fell backwards off of the eight foot high walkway his injuries co range from minimal to fatal (Tr. 26-27).

The inspector had previously notified the operator of t condition (Tr. 25).

Discussion

The facts establish a violation of the regulation. The handrail on the elevated walkway was not of a "substantial construction" since a portion of the guard rail was missing.

Respondent's defense has been previously discussed and denied.

The citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act, now 30 U.S.C. 820(i), sets f the criteria to be considered in assessing civil penalties.

Respondent has no adverse prior history relating to the issuance of any citations. The business, as noted in the stipulation, is quite small. The respondent was highly negl in that these conditions were open and obvious. In addition before these citations were issued, respondent had been informally advised by Inspector Broome of the conditions exi in Citations 588716, 588717, 588718 and 588720. The parties stipulated that the imposition of the proposed penalties wil